No. 78-777

In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

v.

KEITH CREWS

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE UNITED STATES

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1. In this case the court of appeals ordered the suppression of the in-court identification testimony of the victim of a robbery on the ground that that testimony was the tainted fruit of an unlawful arrest of respondent, which produced a photograph that enabled the victim to identify respondent to the police as her assailant. The lead argument in our opening brief was that the court erred in concluding that the in-court testimony was a "fruit" of the unlawful detention for exclusionary rule purposes (Br. 16-45). We argued that evidence should not be held to be a fruit where, as here, the only nexus between what is presented in court and the unlawful conduct concerns the manner in which information lawfully acquired by the police becomes linked to the particular defendant. The court of appeals' contrary conclusion, we contended, amounts in effect to a holding that evidence lawfully acquired may be retroactively tainted by some subsequent misconduct.

Respondent's principal contention is that we have mischaracterized the court of appeals' rationale and the nature of the evidence suppressed in this case, and that there is no principled distinction between the evidence suppressed in this case and many (if not all) other kinds of fruits of police misconduct that have traditionally been recognized as subject to suppression. That contention is incorrect. Notwithstanding respondent's *ad hominem* characterizations of our argument, nothing in his brief refutes our contention that the evidence suppressed in this case and its nexus to the unlawful conduct are significantly different from the kinds of evidentiary fruits that this Court has heretofore held to be subject to suppression.

We acknowledge that it is somewhat difficult to characterize in-court identification testimony in the same terms commonly used to describe tangible evidence, or even other kinds of verbal evidence, like confessions or other statements. When the police find a fingerprint or the murder weapon at the scene of a crime, we refer to the "evidence" as the fingerprint and the weapon themselves, and not their presentation in the courtroom. When the police find an eyewitness who gives them a description of the criminal based on an ample opportunity to observe him, the witness's inchoate ability to identify the culprit is not normally referred to as the "evidence" in question; but analytically that ability is no different from fingerprints, or murder weapons, or any other kinds of tangible evidence that might ultimately serve to link an as yet unknown culprit to the crime. On the assumption that the witness's ultimate identification of the defendant is based on his or her independent recollection of the crime—an

assumption not disputed by the court of appeals or respondent in this case—the witness's ability to identify the defendant is like a photograph that the police find at the scene of the crime and that will acquire prosecutive utility only when the police find the person whom it matches.[1]

In this case the police lawfully "obtained" that mental photograph before respondent was detained; the consequence of the detention was to match the photograph to respondent and thus enable it to be used in his prosecution. For the reasons stated at length in our opening brief, we believe that that kind of nexus is not sufficient to warrant the suppression of lawfully acquired evidence. But whether or not the Court agrees with us in this, we think it clear that the nexus between the suppressed evidence and the police misconduct in this case is very different from the nexus existing in all other exclusionary rule cases decided by this Court, and nothing in respondent's brief undermines that conclusion. In all other "fruits" cases, the police misconduct has disclosed to the police some quantum of relevant information over and above the mere fact that evidence already known to

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[1]The fact that the police cannot themselves see the "photograph" in the witness's mind is immaterial; it means only that they need the agency of the witness in order to match the "photograph" to a real person, much as they may need the agency of an expert in order to match a fingerprint or handwriting exemplar found at the scene to a real person.

them or in their possession matches the defendant. In the ordinary case, for example, the challenged search disclosed the fact that the defendant has relevant evidence on his person, his automobile, or his premises. In *United States* v. *Ceccolini*, 435 U.S. 268 (1978), the unlawful search disclosed the previously unknown fact that a witness possessed relevant information. In the instant case, the only thing the unlawful detention disclosed was the identity of the defendant and the congruence between his physiognomy and the recollection of a known witness.

Respondent is therefore incorrect in contending (Br. 22-23) that our position would require the admission of many, if not all, kinds of evidentiary fruits traditionally subject to suppression, such as stolen property that is found on an unlawfully arrested defendant and that belongs to a known crime victim. In that example, the arrest discloses the fact that the stolen property was found on the person of the defendant; it is this relevant fact that is the fruit of the search in the traditional and established sense, and under our position such evidence would have to be suppressed.[2] Under the logic of respondent's

[2]Of course the witness would under our analysis be able to testify in court to identify the property as his, but that testimony would have little prosecutive value in the absence of testimony establishing where the property was found.

Respondent's other examples of the kind of evidence that he contends would be admissible under our position (Br. 22-23) are also incorrect. If stolen property were found on an illegally arrested defendant and the defendant's fingerprints were found on that property, the testimony of an expert that the prints found on the property matched the defendant's prints would not be admissible under our argument (absent other attenuating circumstances or independent sources). In that example, the unlawful search disclosed the fact that the defendant's fingerprints were on the stolen property, and that fact, under established principles, would be a tainted fruit of

position, however, courts in that example would be required to suppress not only the fact of finding the stolen property on the defendant but also the reliable in-court testimony of the robbery victim that she saw the defendant rob her, if the discovery of the stolen property is what led the police to identify the defendant as the culprit and thus provided the cause for his indictment and prosecution. For the reasons fully set forth in our opening brief, such a view of suppressible fruits has never been endorsed by this Court, would have far reaching and undesirable consequences, and should be rejected.

2. In support of our position, we argued in our opening brief (Br. 29-45) that the court of appeals' theory of tainted fruits would provide limited incremental deterrent

the search. The same would be true of the vacuum sweepings found in the defendant's car during an unlawful search in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

The same analysis applies to Owens' pre-trial identification of the photograph taken of respondent during his unlawful detention, which respondent incorrectly argues (Br. 40-41 and n.27) is indistinguishable from Owens' in-court testimony. With respect to that evidence, the detention disclosed a fact of probative value over and above the fact that the defendant matched the witness's independent recollection of the crime-namely, the fact that the witness identified the defendant's photograph shortly after the crime occurred, when, the jury might conclude, her recollection was fresh.

Whether the trial court correctly suppressed the pre-trial lineup identification as well as the pre-trial photographic identification is, we admit, a more difficult question which is not presented for decision in this case. Arguably the line-up identification is analytically the same as the photographic identification: *i.e.*, the arrest disclosed the fact that a witness selected the defendant from a line-up, and that fact has probative value different from and in addition to the fact that the defendant seated in the courtroom matches the witness's recollection of the criminal. On the other hand, if the line-up is conducted pursuant to a valid judicial order, the basis for differentiating between a line-up identification and an in-court identification is blurred.

benefits and yet impose a very substantial societal cost. Respondent disputes our contention that that theory would have limited deterrent benefits. He argues (Br. 35-41) that the other disincentives to unlawful action that we showed would still exist under our view (*e.g.*, the possible loss of tangible or verbal evidence or pre-trial identifications obtained as a result of unlawful detentions) are not significant because if the police complied with the Fourth Amendment, they would have no prospect of securing such evidence anyway. In short, respondent contends that the police would have nothing to lose by making illegal detentions or arrests if the court declines to allow such actions to taint other evidence retroactively.

Respondent's argument seems to be predicated on the assumption that only unlawful means will be successful in solving crimes; it overlooks the fact that, in this and similar cases, the police often have viable and lawful alternative means of pursuing their investigation. In this case, for example, they could have refrained from taking respondent to the police station and attempted instead to obtain a photograph of him or other identification by investigations at his school.[3] If they recognized that taking him to the police station would ultimately be held unlawfull, the prospect of losing any pretrial identifications or other traditional fruits of the detention would provide a significant incentive to pursue other, lawful investigative approaches; this is so even if the police believe that any illegality in the detention would not inevitably foreclose prosecutive use of in-court identifications of the suspect.

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[3]As we noted in our opening brief (pages 35-36), we do not contend that the police would inevitably have pursued those other investigatory means. But in this case and this class of cases, the fact that unlawful action is not the only viable means of obtaining desired evidence is significant to the assessment of the incremental benefits of suppression.

With respect to the policies of the exclusionary rule, respondent also largely ignores the very substantial societal costs that would be imposed by the court of appeals' theory of tainted fruits. These costs are discussed in our opening brief (pages 36-42), and we do not repeat the discussion here.

3. We also argued in our opening brief that traditional attenuation analysis—although not readily applicable in this context—would support the admission of Owens' testimony. We relied particularly on the contention that the violation was not flagrant and on the absence of any indication that the officers were acting in knowing and deliberate disregard of their legal obligations (Br. 45-55). Respondent repeatedly asserts, however, that the officers were acting in bad faith and without any colorable justification and that the court of appeals so found (Br. 7, 8, 9, 10, 13 n.8, 15, 41 n.29, 53-54, 59).

There is no basis for this claim. Respondent has not cited, and we have not found, any passage of the court's opinion which supports his view that the officers acted in bad faith. Although the court of appeals described the officers' actions as "flagrant" (Pet. App. 44a), its conclusion was based only on the fact that they detained respondent for the specific purpose of obtaining the evidence they in fact obtained, and not upon the courts view that the officers acted in deliberate or reckless disregard of what they believed to be their lawful authority.[4] Indeed, the court of appeals expressly rejected

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[4]Thus, respondent relies (Br. 54) upon the court's statement (Pet. App. 48a) that respondent was illegally detained for the purpose of obtaining identification evidence. That a specific purpose of respondent's detention was to obtain his photograph for exhibition to the robbery victims is simply not tantamount to concluding that such action was undertaken without any support or despite a belief that it was unlawful. Moreover, as we stated in our opening brief (Br. 53)

respondent's contention that the police arrested respondent in bad faith on the pretext that he was a truant in order to cover their intention to obtain evidence in connection with the robberies at the Washington Monument (see Pet. App. 44a-45a n.32).

More fundamentally, the evidence as summarized in our opening brief (pages 51-42) clearly establishes that the police had a substantial basis for suspecting that respondent was the assailant sought in connection with the robberies at the Washington Monument. Furthermore, the officers' limited detention of respondent for the purposes of obtaining his photograph to show to the robbery victims and of determining his truancy status does not support an inference that they acted in willful disregard of what they believed to be proper procedures pursuant to their lawful authority. Respondent states (Br. 44 n.35, 55) that it is appropriate to apply the exclusionary rule "less rigorously" when the detention is undertaken in good faith. See also *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974). We agree. This is precisely such a case.

"[s]ince most Fourth Amendment violations are prompted by an investigative purpose* * *a consideration only of purpose will have the effect of [inappropriately] eliminating this factor from the attenuation analysis in nearly all cases."

CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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